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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM RILEY MOBLEY, Defendant and Appellant.	2d Crim. No. B288173 (Super. Ct. No. 16F-08950) (San Luis Obispo County)

A jury found William Riley Mobley guilty of: count 1, second degree murder (Pen. Code, § 187, subd. (a))[1]; count 2, gross vehicular manslaughter (§ 191.5, subd. (a)), together with an enhancement for two prior convictions (§ 191.5, subd. (d)); count 3, driving under the influence of alcohol and causing injury (Veh. Code, § 23153, subd. (a)), together with enhancements for two prior convictions (Veh. Code, § 23546, subd. (a)), personal infliction of great bodily injury (§ 12022.7) and refusing to take a

[1] All further references are to the Penal Code unless otherwise stated.

chemical test (Veh. Code, § 23577, subd. (a)); count 4, driving with a blood-alcohol level of 0.08 percent or greater causing injury (Veh. Code, § 23153, subd. (b)), together with allegations of two prior convictions (Veh. Code, § 23546, subd. (a)), personal infliction of great bodily injury (§ 12022.7) and refusing to take a chemical test (Veh. Code, § 23577, subd. (a)); and count 5, leaving the scene of an accident (Veh. Code, § 20001, subd. (a)), together with an allegation of fleeing the scene of a crime (Veh. Code, § 20001, subd. (c)).

The trial court sentenced Mobley to 25 years eight months to life as follows: count 1, murder, 15 years to life; count 3, driving under the influence of alcohol causing injury, a consecutive eight months, plus a consecutive one year for great bodily injury; and count 5, leaving the scene of an accident, a consecutive four years, plus a consecutive five years for leaving the scene of a crime. The trial court stayed the sentences on counts 2 and 4 pursuant to section 654.

We stay the five-year term for leaving the scene of a crime pursuant to section 654. In all other respects, we affirm, despite the numerous errors committed by the prosecutor.

FACTS

On September 14, 2016, Mobley stopped by his father's house for a barbecue. He drank "a couple of beers" between 7:00 and 10:00 p.m. At 10:59 that evening Mobley met a friend, Mandy Bennett, at a bar in Pismo Beach. While at the bar, he drank five 20-ounce beers over a period of approximately three hours. Surveillance video from the bar shows that Mobley was intoxicated. He was off-balance, swaying, and had difficulty hitting the cue ball while playing pool. He left the bar at 1:55 a.m. As he left, he ran into the wall with his shoulder. Bennett

considered Mobley to be under the influence of alcohol when he left.

Richard Stabile and Jason Ross were friends. They both worked as security officers, and got off work at midnight on September 14, 2016. They stopped for coffee after work. The men started home each driving his own car. Stabile was driving a Toyota Camry and Ross was driving a Volkswagen Jetta.

Ross started to have car trouble, and pulled off onto the side of Highway 101 in the Nipomo area. Stabile pulled off and parked about one-half car length behind Ross. They were both parked all the way onto the shoulder, at least two feet within the fog line. They were not impeding any lanes of traffic. Both men put on their emergency flashers. Stabile also put on a lane director in his back window, similar to those in police cars, to let other drivers know to move out of the way. Ross called for assistance. Because it was cold outside, both men got back into the driver's seats of their cars to wait.

At about 2:25 a.m., Ross heard tires on the road's rumble strip. He looked in his rearview mirror and saw lights behind Stabile's car. He heard a crashing sound, and was knocked unconscious. When he regained consciousness, he was under the passenger side dashboard of his car.

Ross got out of his car to check on Stabile. Stabile's car was in pieces. Stabile was slumped onto the passenger seat. Ross checked for vital signs, and knew Stabile was dead. Ross suffered a concussion and a fractured jaw. No one from the vehicle that struck them came to their assistance. Ross never saw Mobley that night.

Mobley called his father at about 2:31 a.m. He told his father that he had been in an accident, that he was in trouble,

and that he was alone. Mobley sent a text message to his father stating, "Next exit after Nipomo turn back." A minute later Mobley sent a text message to his father stating, "Delete message."

San Luis Obispo County Deputy Sheriffs Vince Buck and Richard Lehnhoff followed an ambulance to the scene of the crash. The Camry had extensive damage to the driver's side extending from the back bumper to the forward portion of the car. It was at a 90-degree angle to the roadway. The car's occupant had no signs of life. Both the Camry and the Jetta were within the fog line.

The deputies noticed drops of radiator fluid leading away from the crash site. They followed the drops to a white Ford F350 pickup truck parked in a turn-out area. The truck had front-end damage consistent with the collision. No one was with the truck. A person parked in the area told Buck that a man got out of the truck and went into some nearby bushes.

Buck went into an area of thick brush in search of the man. Buck heard brush breaking and smelled alcohol. Buck yelled that he was with the sheriff's department and called for the person to show himself. He did not get a response. About 50 feet into the brush, Buck came across Mobley lying face down underneath some bushes.

Buck ordered Mobley to place his hands behind his back. Mobley did not comply. Buck waited for Deputy Lehnhoff to arrive. They escorted Mobley out of the brush. The deputies could smell alcohol on Mobley's breath, his eyes were red and watery, and his speech was slurred. Mobley had the keys to the F350 pickup truck on his person and the truck was registered to him.

At the collision site, California Highway Patrol Officer Mike Poelking interviewed Ross. Ross, distraught and emotional, was in an ambulance. Ross described to Poelking what had occurred.

Poelking took Mobley into custody. Poelking noticed that Mobley showed signs of alcohol intoxication. Mobley refused a field sobriety test. Poelking gave Mobley an implied consent and refusal advisement for chemical testing. Mobley refused to cooperate. Poelking obtained a warrant for a blood draw, and blood was drawn at a hospital at 6:25 a.m.

Lauren Lewis, a forensic laboratory specialist, testified that Mobley's blood-alcohol level was 0.20 percent when the draw was taken at 6:25 a.m. He calculated Mobley's blood-alcohol level was between 0.24 and 0.28 percent at 2:23 a.m. when the collision occurred.

Following his arrest, Mobley made telephone calls from jail that were recorded and played for the jury. In one call, Mobley told his mother that the wreck was there before he arrived. In another call, he told his father that he hit a preexisting wreck while reaching for a cigarette. He said he only dented the front bumper of his truck. In a call to his friend, Mandy Bennett, he told her she did not have to make a statement.

The collision occurred on the southbound side of Highway 101. The right edge of the southbound lanes was marked by a solid white fog line and a rumble strip. A paved shoulder approximately 11 feet in width extended from the edge of the lane. A tire friction mark from the pickup truck started a half-foot inside the fog line. A tire friction mark from the Camry started 2.2 feet to the right of the fog line. Gouge and scrub

marks inside the rumble strip and fog line showed the cars were not protruding into the roadway.

Scott Peterson, an accident reconstruction investigator for the California Highway Patrol, testified that the truck hit the left rear and left side of the Camry. There were paint transfers between the Camry and the truck. There was so much energy involved it was impossible to quantify the amount of energy transferred. The force of the collision drove the Camry five to six feet up an embankment before stopping. Peterson opined that both the Jetta and Camry were completely on the right shoulder when, for an unknown reason, the truck drifted onto the shoulder. He believed the truck driver's impairment made it unable for him to recognize that he had drifted onto the shoulder where he collided with the Camry, obliterating it.

Prior Convictions

In June 2009, Mobley pleaded no contest to one count of driving with a 0.08 percent or higher blood-alcohol level. In 2010, Mobley pleaded no contest to driving under the influence causing injury and leaving the scene of an accident. At the time of the plea, he was advised pursuant to *People v. Watson* (1981) 30 Cal.3d 290, 300, that if in the future he drove while intoxicated and killed someone, he could be charged with murder.

Defense

Forensic scientist Okorie Okorocha testified that Mobley's blood analysis was performed using incorrect instrumentation. He also testified that calculating blood-alcohol level at an earlier time cannot be done. Okorocha was asked to calculate the blood-alcohol level of a 35-year-old male who consumes 100 ounces of 4.2 percent alcohol starting at 11:00 p.m. and finishing at 1:40 a.m., with an accident occurring at 2:23 a.m. Okorocha testified

it would be 0.14 percent if there were no elimination of alcohol and with elimination it would be a maximum of 0.09 percent, and possibly as low as 0.04 percent.

Henricus Jansen testified as an accident reconstruction expert. He said he was unable to reconstruct the accident with the Camry entirely on the shoulder. He opined that the Camry extended three feet into the slow lane and the truck was entirely within the slow lane at the time of the collision.

DISCUSSION

I.

Mobley contends the trial court erred in admitting Ross's statement to Officer Poelking as a spontaneous statement exception to the hearsay rule

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." The test is: "(1) [T]here must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." (*Showalter v. Western Pac. R. Co.* (1940) 16 Cal.2d 460, 468.)

Here, at the time Ross made the statement, he was sitting in an ambulance at the scene of the collision and was still being treated. He had suffered a concussion and a fractured jaw. His

friend has just been killed, and he had checked his friend's body for vital signs. The trial court's determination that Ross's statement qualifies as a spontaneous statement is well supported by the record. Anyone who had experienced what Ross had experienced would be under the influence of "nervous excitement" so that his "reflective powers" would be in abeyance. (*Showalter v. Western Pac. R. Co.*, *supra*, 16 Cal.2d at p. 468.)

Mobley focuses on the time between the collision and Ross's statement. The time between the incident and the statement is a factor in determining whether the statement qualifies as spontaneous, but it is not determinative. (*People v. Washington* (1969) 71 Cal.2d 1170, 1176.) Here the record does not reflect the precise time between the collision and Ross's statement. But Ross was still being treated in an ambulance at the scene at the time he gave the statement. Given the high degree of emotional and physical trauma Ross experienced, the trial court could reasonably conclude he was still in a state of nervous excitement sufficient to prevent him from reflecting on his statement.

In any event, if it was error to admit the evidence, the error was harmless by any standard. The blood-alcohol test showed Mobley had a blood-alcohol level of 0.20 percent four hours after the collision. If jurors were not convinced by the blood test, they saw a video of Mobley drinking in a bar. He was off-balance, swaying, and had difficulty hitting a cue ball. He ran into a wall on his way out of the bar. No reasonable juror would conclude Mobley was sober enough to drive safely less than an hour later when he collided with Stabile's car. Officers testified Mobley was showing classic signs of alcohol intoxication at the time he was arrested.

Mobley's expert opined that Stabile's car was parked three feet into the slow lane. But the paved shoulder of the road was 11 feet wide where the collision occurred. Stabile's car was not disabled. There is no reason why he would be parked three feet into the roadway. Tire marks and gouges at the scene confirmed that Stabile was parked entirely on the shoulder. Even if the improbable occurred and Stabile was parked three feet into the roadway, he had his emergency flashers on and a lane director in his back window. A sober driver would have avoided hitting the car.

If the jury still harbored any shred of doubt, it would have been eliminated by evidence that Mobley fled from the scene and hid in the bushes to avoid arrest.

Finally, Ross testified at trial. The statement that Poelking testified that Ross had made was essentially the same as Ross's trial testimony.

II.

Mobley contends the trial court erred in admitting double hearsay about what he told his father.

Over Mobley's double hearsay and confrontation clause objections, the trial court allowed Officer Michael Brown to testify. Brown testified that he was present when Mobley's father talked to an investigator. Mobley's father told the investigator that he talked to his son after the collision. His son told him he was in an accident north of Nipomo, he was in trouble, and he was alone. Mobley's father did not testify at trial.

Mobley concedes that his statement to his father comes within the admission of a party exception to the hearsay rule. But he argues there is no exception to the hearsay rule for his father's statement to the investigator.

In order for double hearsay to be admitted, each level of hearsay must be admissible under its own exception. (Evid. Code, § 1201.) Mobley's statements to his father are admissible as admissions of a party. (Evid. Code, § 1220.)

But there is no exception for Mobley's father's statement to the investigator that Mobley said he was in an accident north of Nipomo. That is hearsay and may not be admitted to prove the truth of a statement. Nevertheless, the error is harmless beyond a reasonable doubt. That Mobley's truck collided with Stabile's car was uncontested at trial. Even Mobley's own accident reconstruction expert based his testimony on the premise that Mobley's truck struck Stabile's car.

III.

Mobley contends the trial court erred in admitting evidence and argument about his invocation of his rights to counsel and to remain silent.

At trial the following colloquy took place between the prosecutor and Officer Poelking:

"Q. All right. With respect to the intoxication phase or leg of the case, what did you do after you noticed these objective signs and symptoms?

"A. I asked Mr. Mobley if, you know . . . I basically started asking him initially -- I wanted to ask a series of pre-field sobriety test questions to Mr. Mobley. And from the onset of me saying anything, he simply [said], 'Listen, I've already got an attorney.'

"Q. Let me ask you a couple foundational questions first. With respect to the pre-FST questions, can you please share with the jury what you do in that regard normally and then how you employed it in this case.

"[A]. Sure. So pre-field sobriety test or FST questions are simply qualifying questions that you are trying to determine what's been going on in the recent past of the person that you are investigating. You ask things such as, you know, how much sleep have you had? When did you last sleep? How long did you sleep for? When did you last eat? When did you last drink any alcoholic beverages? Are you epileptic or diabetic? Are you under the care of a doctor or dentist for anything? Are you taking any prescription medication or nonprescription drugs? Things of that nature that you are trying to ask if you feel the effect of alcohol. If they say, in fact, they've consumed alcohol or alcoholic beverages, things of that nature to kind of determine where you need to go from that point in the investigation[.]

"Q. Thank you. And do you typically ask those pre-FST questions before you actually ask a subject to engage in field evaluations?

"A. Yes. A field sobriety test would be secondary after those pre-field sobriety test questions.

"Q. Okay. What would you say is the importance of asking the pre-FST questions?

"A. I'd say the importance -- like I stated previously it's one of those things that helps determine . . . what you're looking for to backup your initial objective symptoms of intoxication. And, you know, whether or not he -- if there was a -- in a case of collision, hey, did you bump your head in the collision? Did you drink anything alcoholic after the collision? Those type things that you're trying to establish before moving onto the investigation.

"Q. Okay. Would the responses ostensibly to those questions, would they be helpful in your future administration of field sobriety tests?

"A. Yes.

"Q. Okay. In this case, I think you shared that Mr. Mobley, upon your pre-FST inquiries, demonstrated an unwillingness. Would that be right to say?

"A. Yes. He stated, you know, 'I've already got an attorney' which to me means leave me alone.

"Q. Did you go on to ask him further questions?

"A. After he stated that he . . . already had an attorney, I did not ask any additional questions. At which point, I *Mirandized* and read Mr. Mobley his rights and proceeded with the arrest.

"Q. Okay. Was your goal to -- initially was your goal to actually administer field sobriety tests to evaluate Mr. Mobley for signs of impairment?

"A. That's correct.

"Q. And you were prepared to do that, I assume, at that location?

"A. Yes.

"Q. Did you then interpret Mr. Mobley's attitude in response to be what's called a refusal?

"A. Yes.

"Q. Can [you] expand a little bit for the jury.

"A. So the refusal, which we touched on earlier, is something -- simply when somebody says, listen, I'm not going to answer your questions. I'm not going to do a field sobriety test and that is what the refusal is. Like I stated, the statement by

Mr. Mobley saying, hey, 'I already have an attorney' tells me that's what, in essence, he's doing a refusal."

The prosecutor argued to the jury that Mobley's refusal to answer the field sobriety test questions showed a consciousness of guilt.

It is fundamentally unfair to use the invocation of the defendant's rights to remain silent and to counsel against him. (*People v. Crandell* (1988) 46 Cal.3d 833, 878.) Comment that penalizes the exercise of those rights is also prohibited. (*Ibid*.)

The People respond that Mobley's refusal to submit to a chemical analysis for blood-alcohol content is admissible to show a consciousness of guilt. (Citing *People v. Sudduth* (1966) 65 Cal.2d 543, 547.) The People also point out that the refusal to take a field sobriety test is admissible to show a consciousness of guilt. (Citing *Marvin v. Department of Motor Vehicles* (1984) 161 Cal.App.3d 717, 719-720.)

The People's argument misses the point. Mobley is not arguing about the admissibility of a refusal to submit to a chemical blood-alcohol test or a field sobriety test. Instead, he is arguing that it was error to admit evidence of his invocation of rights and the prosecutor's comment thereon. Mobley also argues it was error to admit evidence that he refused to take the preliminary alcohol screening test because a suspect has the statutory right to refuse the test. (Veh. Code, § 23612; *People v. Jackson* (2010) 189 Cal.App.4th 1461, 1469.)

The errors were harmless beyond a reasonable doubt. The erroneously admitted evidence was admitted to show a consciousness of guilt. As the People point out, evidence of Mobley's refusals to take a blood-alcohol test and a field sobriety test was properly admitted for that purpose. More importantly,

when a defendant leaves his victims dead and injured on the side of the highway and must be literally dragged out of the bushes by sheriff's deputies, any further evidence of consciousness of guilt is simply superfluous.

IV.

Mobley contends that it was error to allow law enforcement witnesses to opine on his guilt and the reasons for their conclusions

Officer Poelking testified that after Mobley refused a chemical blood test he applied for a search warrant. The search warrant was admitted into evidence as People's exhibit 41. The warrant includes a recital of the factual basis and probable cause to arrest Mobley for violations of section 192 (manslaughter) and Vehicle Code section 23153 (driving under the influence causing bodily injury). Poelking also testified as to the basis for the warrant.

In addition, Poelking testified about the basis for his recommendations to charge Mobley with murder, gross vehicular manslaughter and felony hit-and-run. Poelking opined that Mobley violated Vehicle Code section 23152, driving while intoxicated, and Vehicle Code section 22107, making an unsafe turn, and that those violations were the primary causes of the collision.

Officer Hamilton Adams opined that driving under the influence and making an unsafe turning movement were the primary causes of the collision.

Mobley relies on *People v. Coffman and Marlow* (2004) 34 Cal.4th 1. There, our Supreme Court said: "A witness may not express an opinion on a defendant's guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of

fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] 'Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.'" (*Id.* at p. 77.)

Here, the officers' opinions on the cause of the collision were properly admitted as helpful to the jury's determination of causation. But the search warrant affidavit stating probable cause to arrest Mobley and Poelking's testimony about the basis for his recommendations to charge Mobley with murder, gross vehicular manslaughter, and felony hit-and-run were entirely improper. Such evidence adds nothing to the jury's understanding of the case; it is irrelevant and potentially prejudicial.

In this case, however, the error was harmless. It would not surprise the jury to learn that a police officer involved in the investigation and arrest believes there was probable cause to arrest the defendant and that he is guilty of the crimes charged. As our Supreme Court stated in *People v. Riggs* (2008) 44 Cal.4th 248, 300-301: "Investigator Pina's testimony that he believed defendant was guilty as charged and was untruthful when he denied responsibility for the crimes did not present any evidence to the jury that it would not have already inferred from the fact that Pina had investigated the case and that defendant had been charged with the crimes . . . . In addition, we see nothing in the record that would lead us to conclude that the jury was likely to disregard the instructions it received concerning its duty to decide the issues of credibility and guilt based upon its own assessment of the evidence, not the opinions of any witness. The

jury's exposure to the unsurprising opinions of the investigating officer that he believed the person charged with the crimes had committed them, and was untruthful in denying his guilt, could not have influenced the verdict—especially in light of the overwhelming evidence against defendant."

Here, for reasons previously stated, there was overwhelming evidence against Mobley.

V.

Mobley contends cumulative error requires reversal. It is true that the trial was far from perfect. But the evidence against Mobley was overwhelming, and none of the errors taken separately or together deprived Mobley of a fair trial. The errors did not affect the verdict.

We are compelled, however, to remark on the prosecutor's lack of attention to the rules of evidence and professional conduct. This is not the first time we have encountered this phenomenon. (See *People v. Cowan* (2017) 8 Cal.App.5th 1152.)

The reliance of harmless error as a safety net to compensate for inadequate trial preparation is unacceptable. That overwhelming evidence of the defendant's guilt "saved" this trial from a reversal should not engender prosecutorial complacency. Such carelessness demonstrates neglect for the public interest.

VI.

Mobley contends the five-year sentence imposed pursuant to Vehicle Code section 20001, subdivision (c) was unauthorized and must be stricken

Vehicle Code section 20001, subdivision (c) provides in part: "A person who flees the scene of the crime after committing a violation of Section 191.5 of . . . the Penal Code, upon conviction

of any of those sections, in addition and consecutive to the punishment prescribed, shall be punished by an additional term of imprisonment of five years in the state prison."

Here, a violation of section 191.5, gross vehicular manslaughter while intoxicated, was alleged as count 2. But the violation of Vehicle Code section 20001, subdivision (c) was alleged as part of count 5.

The People concede that Vehicle Code section 20001, subdivision (c) should have been alleged as an enhancement to count 2. The People claim the mistake was simply a clerical error. Mobley argues the mistake was not a clerical error, but prosecutorial negligence. He claims the error deprived him of his due process right to be informed of the charges against him.

But whether clerical error or prosecutorial negligence was involved, Mobley was informed he was being charged with both a violation of section 191.5 and a violation of Vehicle Code section 20001, subdivision (c). Mobley cites no authority that it matters under which count the charges were made.

Mobley's reliance on *People v. Valladoli* (1996) 13 Cal.4th 590, 607, is misplaced. In *Valladoli*, the court held that amending the information to add prior felony convictions after the verdict but before sentencing, as authorized by section 969a, does not violate due process. The court stated that the omission of the priors in the case was apparently due to a clerical error. The court did not decide whether the prosecutor could intentionally delay charging priors until after the verdict.

We are not concerned with amending the information after sentencing. Here the information was sufficient to give Mobley notice of all the charges, and need not be amended.

Mobley points out that the sentence on count 2 for violating section 191.5 was stayed pursuant to section 654. He argues, without citation to authority, that because the Vehicle Code section 20001, subdivision (c) enhancement cannot be attached to any offense on which he was sentenced, the enhancement must be stricken.

But section 654 prohibits only double punishment, not double sentencing. The accepted procedure is to sentence the defendant on each count and stay execution of the sentence on those counts to which section 654 applies. (*People v. Jones* (2012) 54 Cal.4th 350, 353.) Thus, we agree with the People that the sentence for violating Vehicle Code section 20001, subdivision (c) should have been stayed, but not stricken.

The judgment is amended to stay the five-year sentence on Vehicle Code section 20001, subdivision (c). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Michael L. Duffy, Judge
(Retired Judge of the San Luis Obispo Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Superior Court County of San Luis Obispo

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